87-812

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATHAN A. LEVY, JR.,

Petitioner

v.

EXXON CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether a Circuit Court of Appeals is empowered to make findings of fact in the first instance under Federal Rule of Civil Procedure 52(a) where the findings in question were not addressed by the District Court because of an error of law.

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v.

EXXON CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Nathan A. Levy, Jr. respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 24, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported but appears in the Appendix to the petition. The order on rehearing rendered on August 10, 1987 is not reported but is reproduced in the Appendix. The opinion of the District Court for the Eastern District of Louisiana, which is not reported, also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on June 24, 1987. A timely petition for rehearing, filed on July 21, 1987, was denied on August 10, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Federal Rule of Civil Procedure 52. *Findings by the Court*

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

STATEMENT OF THE CASE

In 1980, the Louisiana Commissioner of Conservation ordered the creation of a compulsory drilling and production unit covering one sand encountered by a well drilled in St. Mary Parish, Louisiana. The "Y RD SUA" unit was for production of natural gas and condensate from a formation defined as the "Y" Sand, Reservoir D.[1] Petitioner Nathan A. Levy, Jr. owned some of the land that was force pooled in the unit. Respondent Exxon Corporation was lessee under oil, gas and mineral leases that covered the remaining land within the unit. The unit well was located on the Exxon property. Upon Exxon's application, the order appointed Exxon as the unit operator. (R. 10-12)

Levy and Exxon thereafter entered into an operating agreement to govern production from the unitized sand; operation, reworking, recompletion and abandonment of the unit well, and; maintenance and release of the unit leases. Consistent with the commissioner's order, the contract provided that Exxon was the operator of the well for the joint account of the parties. (R.13-45)

Levy filed the present complaint for damages in 1984, alleging that Exxon breached the operating agreement by abandoning the unitized sand without timely notifying Levy, and by permitting its unit leases to expire without timely notifying Levy and without his consent, both of which deprived Levy of the opportunity to take over Exxon's interest in the unitized sand, unit well, and unit leases. (R. 8-9) The action was filed in state court, removed to the District Court for the Western District of Louisiana under diversity jurisdiction, and transferred to the Eastern District of Louisiana as a more convenient forum. Levy waived a jury trial and tried his action before Judge Morey L. Sear of the Eastern District in June, 1986.

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[1]Under La.R.S. 30: 9 & 30:10 the Commissioner of Conservation is authorized to create drilling and production units for the prevention of waste and drilling of unnecessary wells. La.R.S. 30:9 defines a "unit" as the maximum area which may be efficiently and economically drained by one well.

At trial, Levy showed that by letter dated March 16, 1984, Exxon notifed him that the unit well had ceased to produce on February 29, 1984. The letter stated that the well was being analyzed for "remedial possibilities" and was referenced by caption to the unitized "Y" sand.[2] (Tr. 21) Exxon next contacted Levy on August 22, 1984 requesting his authorization for expenditure to plug and abandon the well. Levy advised Exxon that he did not consent to abandonment of the unit well and elected to exercise his option under the operating agreement to take over Exxon's interest in the unit sand and unit well. Levy set forth his plans to rework the well and demanded assignment of Exxon's unit leases and interest in the well equipment. Exxon responded that both its underlying leases and the operating agreement had expired by their own terms. All of Exxon's leases contained provisions that unless production was restored or a reworking operation commenced within ninety (90) days after a cease in production, the leases would automatically terminate. By similar term in the operating agreement, the parties rights therein expired concurrently with the unit leases.

The parties stipulated that Exxon shut-in the well on February 29, 1984 because it was no longer producing gas. Exxon again flowed the well from March 7 until March 21 in an effort to restore production. The reservoir engineer and the geologist assigned to the well both testified that aside from flowing the well in March, no study or further effort was directed towards reestablishing production from the unitized sand. (Tr. 214: 301-302) The supervising district geologist confirmed that Exxon ceased efforts to

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[2] *Introduction To Oil And Gas Production*, 4th ed. (1983), compiled by an executive committee on vocational training of the American Petroleum Institute defines *remedial* operations as restoring production from an *existing formation*. Robert Carson of Exxon, who was chairman of the committee, testified that the publication is used in the training of Exxon personnel.

produce the unitized "Y" sand when the well was shut in for the final time on March 21. (Tr. 323-326)

On March 9, the reservoir engineer initiated an evaluation for a recompletion[3] operation uphole in the non-unitized "W" sand.[4] The recompletion evaluation consisted of a study of the production history of the unitized "Y" sand by Exxon's geologist and reservoir engineer to ascertain if there was any correlation between it and the non-unitized "W" sand formation located higher up in the well. (Tr. 298-300; 214) Exxon then conducted a wireline operation in April to determine the bottom hole pressure in the well. The engineer testified that the purpose of this procedure was to see if the lower "Y" sand could be isolated or plugged off to permit recompletion uphole in the "W" sand. (Tr. 224-225) The recompletion evaluation presupposed the plugging and abandonment of the unitized sand formation. The engineer's evaluation resulted in a recompletion proposal that was submitted to management. Exxon's management rejected the proposal between May 14 and May 18. (R. 646; Tr. 237-239)

While the well was being flowed, the engineer requested a lease maintenance opinion, on which he pointed out that the well was not expected to be returned to production. He indicated that a recompletion was being evaluated. (Tr. 219-222) The opinion he received was that unless a reworking or recompletion was commenced, or production restored, before May 29, all of Exxon's unit leases would expire. The parties stipulated that the district engineering

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[3]*Recompletion* is defined as an operation to change producing formations in an existing well. See *supra*, note 2.

[4]The parties stipulated that Levy's interest in the well was confined to the unitized "Y" sand, both by the commissioner's order and under the operating agreement. (R.651) The rights to the "W" sand, being a separate and distinct geologic formation, were owned exclusively by Exxon. (R. 26)

manager then approved the engineer's March 28 well report notifying the field superintendent in charge of the well that unless a recompletion was attempted, Exxon would not maintain the leases. (R. 652-653) When the recompletion proposal was rejected on May 18, Exxon simply let its leases expire.

Exxon did not resign as operator of the unit well, or otherwise notify Levy or the Commissioner of Conservation that it had ceased efforts to produce the unitized sand. (R. 653) Exxon continued to bill Levy for operation of the unit well. Levy was responsible for payment of his portion of the costs incurred by Exxon for the joint account, with expenditures exceeding fifty thousand dollars ($50,000.00) requiring his prior approval. Levy testified that he did not conduct an evaluation to rework the well because a parallel study would have subjected him to double costs. (Tr. 22-25; 51) The March 16 letter represented that Exxon was evaluating remedial possibilities which, as unit operator, was also on Levy's behalf. Exxon did not inform Levy that it did not expect the well to be restored to production when it wrote to him and gave no indication that its efforts were directed towards recompletion of a non-unitized formation.[5]

At trial, Levy contended that Exxon breached its article 18.1 obligation to notify him of its decision to abandon the unitized "Y" sand when Exxon ceased efforts to produce it on March 21, the date the well was shut-in. Levy contended

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[5]Had Exxon proposed a recompletion, the parties would have arrived at a position of competing over the well bore for Levy's right to the unitized sand against Exxon's right to the non-unitized sand. This situation, governed by article 18.2 of the agreement, would have required Levy to conduct a non-consent operation under article 10.1 at his sole expense, or relinquish all further rights in the unitized sand, and thus the well. In the latter event, Levy would have had the right to demand payment in cash for his interest in the well equipment under article 18.3. (R. 26)

further that Exxon breached its article 19.1 obligation to notify him fifteen (15) days before it permitted its unit leases to expire.[6] (R. 418) Levy also argued that the term *remedial* as used in the oil and gas industry means efforts to restore production from an existing formation as a matter of law, and that the March 16 letter was misleading in representing that Exxon was evaluating remedial possibilities in the unitized sand for the joint account when it was actually evaluating a recompletion uphole in a non-unitized sand solely for its own benefit.

After Levy rested his case, Exxon moved for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b). In granting the motion, the district court held that the contractual requirement of notice of abandonment never became operative: "Exxon did not abandon the well, because it had no intention of stopping production while the well was producing hydrocarbons." (Tr. 438) The district made a legal determination that the term *abandon* applied only to producing wells. The district court also ruled that the term *remedial* in the March 16 letter was not limited to evaluation of the existing formation: "The letter didn't limit that analysis to remedial possibilities for the 'Y' sand." (Tr. 437) The district court found that the March 16 letter "had the effect of notifying Levy that his rights under the agreement would expire ninety days after cessation" of production unless a reworking was commenced, but made

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[6] "'19.1 RELEASE. The leases set forth on Exhibit A shall not be released in whole or in part as to lands within the Unit Area without mutual consent of the parties hereto. If any party hereto at any time desires to so release, it shall give notice to the other party hereto. The party notified shall have the option, for fifteen (15) days thereafter, to receive upon demand an assignment... In the event the party notified does not elect to receive such assignment, the lease as to which such notice is given may be released..." (R. 27)

When management rejected the recompletion proposal on May 18, the date had already passed when Levy should have been notified that Exxon's leases were going to expire on May 29 since Exxon did not obtain extensions on its leases. (R. 646)

no ruling on Exxon's article 19.1 obligation to notify Levy fifteen (15) before expiration of the unit leases, with which the agreement concurrently expired. (Tr. 436) The court found that Exxon did make remedial efforts with respect to the unitized sand by flowing the well, but made no finding as to the date Exxon ceased efforts to produce it since it concluded that the notice of abandonment obligation was inapplicable. (Tr. 437)

Levy appealed the district court's legal interpretation of the terms *abandon* and *remedial*, and urged ruling on Exxon's obligation to notify Levy before the leases expired under Article 19.1. In addition, Levy asserted that Exxon had a fiduciary duty to notify him when it ceased efforts to produce the unitized sand because as operator it had control of Levy's interest in the sand.

A panel of the Fifth Circuit affirmed on different grounds. The court assumed, without reaching the question, that Exxon breached its notice of abandonment obligation but found that "Exxon's failure to perform this contractual requirement did not cause the loss for which Levy seeks damages." The Fifth Circuit ruled that since Exxon did not propose a reworking operation it was incumbent on Levy to do so within ninety (90) days of the cease in production in order to prevent the expiration of Exxon's leases. The court found it to be clear that Exxon's failure to give notice of abandonment under article 18.1 did not cause Levy to lose the opportunity to take over Exxon's interest and rework the well.

The Fifth Circuit declined to address Exxon's asserted fiduciary obligation to give notice of abandonment, stating "we have assumed that the Article 18.1 obligation to give notice of abandonment did apply in this case and that Exxon failed to perform this contractual requirement." The court made no ruling on the obligation of notice on release of the leases under article 19.1. The Fifth Circuit

made no ruling on any of the legal issues urged, but, instead, made findings of fact:

> Our holding may be understood to rest on a determination of causation, which is normally a finding of fact. If so, we expressly conclude that a remand to the district court for factfinding on this issue is unnecessary.

REASONS FOR GRANTING THE WRIT

The court below held that it is within the scope of appellate review for a Circuit Court of Appeals to make findings of fact, and draw inferences therefrom, in the first instance when reviewing documentary proof or a record containing undisputed facts. Prior to this decision, Federal Rule of Civil Procedure 52(a) was amended to avoid the continued confusion and conflict among the circuits as to the authority of the Courts of Appeals to engage in fact-finding where the district court has failed to find on an issue because of an error of law. The decision below promotes continued confusion and disparity in the standard of appellate review for findings based on credibility evaluations and those resting on documentary proof or undisputed facts. The decision further conflicts with the interpretation this Court has given to Rule 52(a) and the permissible scope of appellate review.

The Fifth Circuit's decision in this case enables the Courts of Appeals to dispense with Rule 52(a) by avoiding remand to the district court for fact-finding when it views the record as clear. Fact-finding is a function committed to the district courts in all cases. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985):

> This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts.

The decision below is not an isolated departure from the practice in the Fifth Circuit. It is a continuation of a divergent line of authority that developed prior to the 1985

amendment of Rule 52(a) that permitted the Courts of Appeals to participate in the fact-finding function when reviewing documentary evidence or uncontraverted proof. The principal authority cited by the court below was *Armstrong v. Collier* 536 F.2d 72,77 (5th Cir. 1976), which holds that a remand to the district court for factfinding is unnecessary,

> [i]f all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed, or if the record as a whole presents no genuine issue of material fact.

536 F.2d at 77.

Robinson v. National Cash Register, 808 F.2d 1119, 1122 n. 4 (5th Cir. 1987), also cited in the opinion below, further demonstrates the Fifth Circuit's continued adherence to an interpretation of Rule 52(a) that permits the appellate court to share more actively in the factfinding function. In *Robinson* the court found that the parties had not arrived at a "meeting of the minds" to establish a mutual release of the contract in issue. Relying on *Armstrong, supra,* as authority, the *Robinson* court ruled that remand to the district court for factfinding was unnecessary under Rule 52(a).

Anderson v. Bessemer City, supra, clearly overruled any authority of the Courts of Appeals to make findings of fact in the first instance under Rule 52(a). Whatever doubt that Justice Blackmun's *concurring opinion*, 470 U.S. 581, may have left on the question was resolved by the subsequent amendment of Rule 52(a). By its terms, the Rule designates the trial courts as trier of fact in the first instance, subject to the clearly erroneous standard of appellate review. Compliance with the statutory limitation requires remand by the Courts of Appeals to the district courts for fact-finding in all cases where there has been no finding by the district court, regardless of the character of the evidence in the record. The statute applies to findings of basis facts as well as the inferences drawn therefrom. *Pullman-Standard v.*

Swint, 456 U.S. 273, 287 (1982). The Courts of Appeals have no authority under Rule 52(a) for *de novo* review of the record. See *Anderson v. Bessemer City*, *supra*.

The opinion below did not mention much less analyze the crucial date that respondent Exxon was obligated to give notice of abandonment. In making an inference of causation, the Fifth Circuit avoided ruling on Exxon's contractual as well as fiduciary obligations to provide notice by relying on facts never found by the trial court and not even discussed in the appellate court's opinion. The practice of appellate courts making findings of fact to resolve legal issues has been expressly rejected by this Court as contrary to Rule 52(a). *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, ____ (1986):

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings . . . [I]t should not simply have made factual findings of its own.

Petitioner does not contend that fact-finding was necessary to resolve the legal issues in question but merely points out that if the Fifth Circuit was of that view it should nonetheless have remanded to the district court for fact-finding.

The Fifth Circuit is proceeding by developing a line of authority, as shown in this opinion and the decisions cited therein, that promotes continued confusion and conflict among the circuits over the scope of appellate review allowed by Rule 52(a). The authority of the Courts of Appeals to make findings of fact on a record of documentary evidence and uncontraverted proof has long been in dispute. The 1985 amendment of the Rule reflects a policy decision that the expedience of permitting the appellate tribunal to share more actively in the fact-finding function is outweighed by the public interest in recognizing the trial court as the trier of fact in all cases, and it was clearly intended to establish uniformity among the circuits on this question.

CONCLUSION

The decision below conflicts with decisions of this Court on the authority of the Courts of Appeals to make findings of fact under Federal Rule of Civil Procedure 52(a). The Fifth Circuit plainly exceeded its role by engaging in fact-finding. Its decision reopens the door on appellate review of facts and invites similar action by other circuits. To avoid continued confusion and conflict among the circuits on an important issue of statutory construction, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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November 2, 1987

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86-3503

NATHAN A. LEVY, JR.,
Plaintiff-Appellant,

versus

EXXON CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-85-1657-G)

(June 24, 1987)

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges. JOHNSON, Circuit Judge:*

Plaintiff Nathan A. Levy appeals from the district court's judgment dismissing his action. Levy principally contends that the district court erred in its interpretation of a contract between Levy and defendant Exxon Corporation. Resting our decision upon another ground, we find it unnecessary to reach this asserted error. We reject Levy's remaining contentions and affirm.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. Facts and Procedural History

In 1980, the Louisiana Commissioner of Conservation ordered the creation of a single unit for the drilling and production of gas and condensate from a certain sand in Louisiana. Plaintiff Nathan A. Levy owned some of the acreage within the unit; this acreage was not leased to defendant Exxon. Exxon was lessee under certain oil, gas, and mineral leases with third parties that covered the remaining land within the unit. The Commissioner's order designated a preexisting well within the unit as the "unit well" and further designated Exxon as the unit operator.

Levy and Exxon thereafter entered into an Operating Agreement concerning the management and operation of the land in the unit for the exploration, development, and production of hydrocarbons from the sand. Under the agreement, Exxon was the operator, Levy the nonoperator.

By letter dated March 16, 1984, Exxon notified Levy that the unit well had "ceased to produce February 29, 1984." Exxon did not propose any operation to rework or recomplete the unit well; neither did Levy. By letter dated August 22, 1984, Exxon requested Levy's approval of expenditure for plugging and abandoning the unit well.

Levy responded in September 1984 by treating the request for approval of expenditure as "notice," pursuant to Article 18 of the Operating Agreement, of Exxon's desire to "abandon" the unit sand. Levy advised Exxon that he did not consent to abandonment. Instead, Levy indicated that he intended to exercise his option under Article 18 to take over Exxon's interests in the unit sand. Levy indicated further that he would rework the unit well as soon as Exxon had complied with Article 18 by transferring its interests to Levy.

Exxon maintained in turn that both the Operating Agreement and Exxon's underlying leases with third-party lessors had expired by their own terms. In late September 1984, Levy filed the present complaint for damages, alleging that

Exxon had "operated the unit well until early in 1984 when it stopped producing and has since abandoned said well without giving [Levy] timely notice as required by the operating agreement and an opportunity to take over operations of the unit and the unit well." The unit well was not in fact plugged and abandoned until months later, on or about March 11, 1985.

Trial was to the bench. After Levy had rested his case, Exxon moved for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b). The district court granted the motion, providing oral reasons, and dismissed the action with prejudice. Levy appeals. We affirm.

II. Discussion

A.

Article 18.1 of the Operating Agreement addresses abandonment by fewer than all parties:

> LESS THAN ALL PARTIES. The Unitized Sand in the Unit Well shall not be abandoned without mutual consent of the parties hereto. If any party hereto desires to so abandon, it shall so notify each other party hereto in writing and request its consent to such abandonment. If a party does not consent (such party being hereinafter called non-abandoning party, whether one or more) and the party proposing to abandon the Unit Well does not then agree to continue the joint operation thereof (such party being hereinafter called abandoning party, whether one or more), non-abandoning party shall have the option to take over the interest of abandoning party in said sand and thereby become the owner of abandoning party's Operating Rights.

The Article goes on to describe how the interests of the abandoning party shall be transferred.

Before the district court, Exxon maintained that the notice requirement of Article 18.1 did not apply because there had been no abandonment. According to Exxon, abandonment required intent to abandon a producing well. Exxon contended that the present unit well ceased producing before Exxon formed an intent to abandon it. Exxon concluded that, since there was no abandonment, the contractual requirement of notice of abandonment never became operative. The district court apparently agreed with Exxon's interpretation of the term *abandon* because the court determined that "Exxon did not abandon the well, because it had no intention of stopping production while the well was producing hydrocarbons." On this appeal, it is Levy's principal contention that the district court's determination reflects a faulty legal interpretation of the term *abandon* as it appears in the Operating Agreement.

We need not and do not reach the question whether the district court's interpretation of the term *abandon* is unduly narrow.[1] We may assume that Levy is correct in contending that Exxon formed a qualifying "desire[] to. . .abandon" the well once it had ceased production and that Article 18.1 required Exxon to give notice of this desire to abandon the well. Even making this assumption, we conclude that Exxon's failure to perform this contractual requirement did not cause the loss for which Levy seeks damages.

Levy alleges that substantial recoverable reserves remained in the unit sand. According to Levy, if Exxon had given notice of abandonment, Levy would have taken over Exxon's interests in the unit sand and would have reworked the unit well and would have enjoyed profit from the restored production of hydrocarbons. Thus, Levy contends that Exxon's failure to give notice of abandonment caused Levy to lose the opportunity to take over Exxon's interests and to rework the well in order to restore production and to profit therefrom.

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[1] **See generally** *Risinger v. Arkansas-Louisiana Gas Co.*, 198 La. 101, 3 So. 2d 289, 293 (1941); *Tyson v. Surf Oil Co.*, 195 La. 248, 196 So. 336, 341 (1940).

Levy's contention ignores two features of the circumstances and agreement in this case: (1) the expiration of Exxon's lease interests in the unit sand after cessation of production and (2) the article of the Operating Agreement governing reworking the unit well.

First to the leases: The parties stipulated that "[a]ll of Exxon's leases contained the following provision, or a provision similar thereto, to-wit:

> 'If, after the discovery and production of oil, gas or other minerals in paying quantities, the production thereof should cease from any cause this lease shall terminate unless Lessee resumes or restores such production, or commences additional drilling, reworking or mining operations within ninety (90) days thereafter and continues such operations. . . '."

Under this lease provision, once production ceased, Exxon's leases expired within ninety days unless a reworking or similar operation was commenced and continued. The parties agree and the district court determined that production did cease, that no reworking was commenced, and that Exxon's leases did expire.

In order to prevent the expiration of Exxon's leases, a reworking had to be commenced and continued. Reworkings are governed by article 10 of the Operating Agreement. Article 10.1 provides, in part:

> NON-CONSENT OPERATIONS. Unless agreed to by all parties hereto, the Unit Well shall not be abandoned, reworked or recompleted so long as it is producing Unitized Substances in paying quantities. Upon cessation of such production, OPERATOR shall immediately notify NON-OPERATOR. Any party hereto desiring to rework or recomplete such well or to drill another Unit Well must give the other parties hereto written notice of the proposed operation, specifying the work to be performed (with sufficient details so the

> other parties may properly evaluate such operation) and estimated cost thereof. Each party receiving such notice shall inform the party proposing the operation . . . after receipt thereof, whether or not the party receiving such notice elects to participate therein.

Exxon's letter of March 16, 1984, to Levy indicated that production had ceased, and the district court determined that this letter fulfilled Exxon's obligation under Article 10.1 to give notice.

Since Exxon did not thereafter propose a reworking to Levy under Article 10.1, it was incumbent upon Levy — if he chose to do so — to propose and commence a reworking within ninety days of cessation of production in order to prevent the expiration of Exxon's leases. It becomes clear that any failure by Exxon to give additional notice under Article 18.1 of intent or desire to abandon did not cause Levy to lose the opportunity to take over Exxon's interests and to rework the well to restore production.[2] It was Levy's own failure to act, once he had been notified of the ceased production, that permitted Exxon's leases to expire. Of course, lease expiration then foreclosed any reworking to restore production.

Our holding may be understood to rest on a determination of causation, which is normally a finding of fact. If so, we expressly conclude that a remand to the district court for factfinding on this issue is unnecessary. **See** *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976); **see also** *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1122 n.4 (5th Cir. 1987).

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[2] Exxon sufficiently raised this issue before the district court to permit our consideration of the issue whether or not the district court relied upon it. **See** *Southern Natural Gas Co. v. Pontchartrain Materials, Inc.*, 711 F.2d 1251, 1257 n.7 (5th Cir. 1983) ("We may, of course, affirm the district court's decision on any ground urged below, regardless of whether it was relied on by the district court."); **cf.** *J.E. Riley Inv. Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97 (1940) court of appeals may affirm on ground neither presented to nor relied upon by the court below).

B.

Anticipating that this Court might agree with the district court that Exxon's Article 18.1 obligation to give notice never became operative under the circumstances of this case, Levy relies in the alternative upon general theories based on concepts of good faith and fiduciary duty in urging this Court to create or recognize a duty to give notice of abandonment under the present circumstances. We need not address these alternative theories. Throughout our discussion of the Operating Agreement's express terms, we have assumed that the Article 18.1 obligation to give notice of abandonment did apply in this case and that Exxon failed to perform this contractual requirement. As discussed, even with this assumption, Levy's action must fail.

Finally, Levy makes two additional contentions concerning the fact that Exxon's letter of March 16 to Levy stated that the unit well was "currently being analyzed for remedial possibilities." First, Levy asserts that Exxon owed an extracontractual duty to convey true information and that Exxon's statement concerning remedial possibilities was false. Assuming Levy's statement of Louisiana law to be correct, Levy's contention here must fall, at the very least, before the district court's not clearly erroneous finding that the Exxon statement was in fact true.

Second, Levy relies upon the concept of detrimental reliance or equitable estoppel. " 'The three elements required for application of equitable estoppel are: (1) A representation by conduct or work; (2) Justifiable reliance thereon; and (3) A change of position to one's detriment because of the reliance." *John Bailey Contractor, Inc. v. State*, 439 So. 2d 1055, 1059-60 (La. 1983) (quoting *John Bailey Contractor, Inc. v. State*, 425 So. 2d 326, 328 (La. App. 1982). Levy contends that he did not propose a reworking of the unit well because he was relying upon Exxon's statement that it was analyzing remedial possibilites. It is doubtful whether this theory was squarely presented to the district court. **See** *Guerra v. Manchester*

Terminal Corp., 498 F.2d 641, 658 n.47 (5th Cir. 1974) ("Ordinarily a reviewing court does not consider issues raised for the first time on appeal" to overturn determinations of the district court). Nevertheless, to the extend presented, the district court rejected recovery under this theory. Levy may have initially hoped that Exxon would itself propose a reworking after concluding its analysis of remedial possibilities. As the ninety day period began to slip away and Exxon remained silent about any proposed reworking, Levy could not *justifiably* have relied upon the March 16 letter to forego making a reworking proposal of his own. Thus, the absence alone of the second element precludes recovery under a detrimental reliance or equitable estoppel theory.

III. Conclusion

We have considered Levy's remaining contentions and found them to be without merit. The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3503

NATHAN A. LEVY, JR.,
Plaintiff-Appellant,

versus

EXXON CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 10, 1987)

Before CLARK, Chief Judge, and BROWN, and JOHNSON, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED**

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge
/d/ 8-3-87

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
No. 85-1657 "G"

NATHAN A. LEVY, JR.

versus

EXXON CORPORATION

PARTIAL TRANSCRIPT OF PROCEEDINGS had on the 18th day of June, 1986, before His Honor Judge Morey L. Sear, at the United States District Courthouse, New Orleans, Louisiana.

Reported by:

Thomas L. Massey,
Official Court Reporter

* * * *

The entire opinion of Judge Sear is reproduced.

JUNE 18, 1986

THE COURT: Well, this is an action in damages from an alleged breach by defendant Exxon Corporation of its obligations to the plaintiff, Nathan Levy, under the terms of an operating agreement covering Exxon Corporation's William No. 1 Well or Williams No. 1, located in the Weeks Island Field in St. Mary and Iberia Parishes in Louisiana. The dispute revolves around the meaning of certain terms in the operating agreement, as well as certain of the activities of Exxon Corporation.

Both the plaintiff and the defendant have entered into a stipulation of some facts, and I have taken into consideration those facts, as well as those that I have heard established here in the testimony of the various witnesses that have been called so for by plaintiff and the depositions of the witnesses that have been offered through that medium. I think that for purposes of this ruling it's necessary for me to set out the positions of the plaintiff and the defendant as I understand them, so that perhaps my ruling will be more clear to you. The plaintiff contends that the issue of liability in this case arises from a March 16, 1984 letter written by an Exxon representative to Mr. Levy, which stated that Exxon was analyzing the well for remedial possibilities. During mid-1983 the well began to decline in production, and Mr. Levy received a letter from Exxon dated June the 6th of 1983, which advised him that the well was anticipated to deplete by the end of that month. Mr. Levy attempted to obtain some further information about what was going on by telephone, but he got not response, but production continued. It didn't in fact stop until the spring of 1984. So Mr. Levy assumed that Exxon had performed remedial operations on the well to restore its production, and he also assumed that Exxon's notification to him that production would cease by the end of June, 1983 was moot. Then in January of 1984 Mr. Levy spoke with Danny Guiterez who testified here yesterday.

He was the reservoir engineer of Exxon responsible for the Williams No. 1 Well with regard to Exxon's intended plans. While Mr. Levy spoke to Mr. Guiterez on the telephone, Mr. Guiterez refused to give him any information over the phone. He didn't respond to the inquiry at all. Then by letter, dated March the 16th, 1984, Mr. Levy was advised by Exxon that the well had in fact ceased production on February the 29th of 1984, but that Exxon was analyzing the possibilities of remedial action, or I think it said something about like Exxon was analyzing the well for remedial possibilities, words to that effect. At that point Levy again sought to communicate with Exxon by telephone, but his telephone calls were not returned. He simply assumed that Exxon was pursuing a good faith effort of remedial possibilities. Mr. Levy suggests, for example, that the "Y" sand could have been perforated or squeezed to restore production, and he also suggests that a sidetracking operation could have been performed. According to the plaintiff no remedial possibilities were ever considered. Instead, Exxon was considering recompletion up hole in the "W" sand, a sand in which Mr. Levy had no interest at all, and after March 16, 1984 Mr. Levy received no further communication from Exxon until he received a letter dated August the 22nd, 1984 with an AFE, an authorization for expenditure to plug and abandon the well. At this point Mr. Levy advised the defendant that he hadn't received a notice of intention to abandon as required in the operating agreement. So he was advised by Exxon that the August 22nd letter constituted that notice. He then informed Exxon that he didn't consent, and he called upon Exxon to comply with the terms of the operating agreement. At that point Exxon offered to convey to him the well and its equipment, though it pointed out that all of the leases and the operating agreement had expired some months earlier on May the 29th, 1984.

So Mr. Levy took the position that the tender or offer was just a meaningless act or meaningless gesture. He contends that Exxon did not only breach the notice or the notice requirement of the operating agreement, but it also breached the legal duty it owed as the unit operator of full disclosure to him. He claims that Exxon breached that duty of disclosure by not disclosing its decision to cease its efforts to produce the "Y" sand, when it was in fact evaluating the "W" sand, and that duty, according to Mr. Levy, is one that's imposed by Section or Article 7.1 of the operating agreement, which requires Exxon to provide to Mr. Levy access to the unit area. It requires that he have access to all information pertaining to the development or operations of the unit. Furthermore, the operating agreement imposed on Exxon the obligation to obtain Mr. Levy's consent prior to the abandonment of the unitized "Y" sand. Article 10.1 and 18.1 and 18.2 of the agreement require the consent of all parties before the unitized sand could be abandoned.

Now, the plaintiff has sought to prove at trial, contrary to Exxon's representations in the March 16, 1984 letter, that it made no good faith analysis of the remedial possibilities in an attempt to restore production of the "Y" sand. Levy's contention is that the Exxon pumper's action in flowing the well to the pit simply didn't constitute a good faith effort to reworking or remedial operations. He also contends that the operating agreement requires Exxon to give him timely notice of its intention to abandon the well and to release the Exxon leases to afford him the opportunity to take over the operation and to preserve the leases and the production. Now, that is, as I understand it, the plaintiff's position or the plaintiff's contention, or the essence of it.

Now, Exxon began production of the well in January, 1981. In 1983 Exxon says that production declined, and they anticipated that it would deplete by the end of June of

1983, but it didn't, and gas was produced from that unitized "Y" sand until February 29, 1984, when the well watered out and ceased to produce hydrocarbons. Then on March the 1st of 1984 Exxon's field superintendent advised Exxon's district reservoir engineer in its accounting section in these words, "We plan to unload it," meaning the well, "to the pit next week to try and restore some gas production." The engineer advised the accounting section that it evaluate a recomplete in the well, and that evaluation concerned the "W" sand. Then on March 16, 1984 the letter that I've referred to was written. It says, "This is to advise that the last well on the captioned accounting unit ceased to produce February 29, 1984, due to a high water cut. This well is currently being analyzed for remedial possibilities. This information is furnished for the review of any lease maintenance problem you may have as a result of this well being off production," and it was sent to Mr. Nathan Levy at 607 Pere Marquette Building in New Orleans.

Now, from March the 7th of 1984 until March the 20th Exxon flowed the well to the pit in an effort to restore production. The attempt was unsuccessful. So the well was shut in on March the 21st. So Exxon contends that it did in fact analyze the well for remedial possibilities. Article 7.2 of the operating agreement provides, and I'm going to read off of the agreement the titles, because I think that they have significance in this agreement. It's Article 7.2, and says, "Non-operator shall have the right upon written request to operator to be furnished with copies of all drilling reports, well logs, samples of cores or cuttings taken from wells drilled hereunder, and any other reasonable information relating to drilling and producing operations hereunder." Notice that 7.2 says upon written request to the operator. Levy made no such request. Then Article 10.1 of the operating agreement provides under the heading Non-consent Operations, "Unless agreed to by all

parties hereto, the unit well shall not be abandoned, reworked or recompleted as long as it is producing unitized substances in paying quantities. Upon cessation of such production, operator shall immediately notify non-operator. Any party hereto desiring to rework or recomplete such well or to drill another unit well must give the other parties hereto written notice of the proposed operation, specifying the work to be performed with sufficient detail so the other parties may properly evaluate such operation and estimated cost thereof," and it goes on a bit further. Exxon thus contends that the March 16, 1984 letter constituted notice of cessation of production pursuant to Article 10.1. They also contend that had Levy wanted to rework or recomplete the well, then he was required to give written notice to Exxon of the proposal, and no such written notices were sent. Exxon further contends that the March 16, 1984 letter did not constitute a notice to Levy that Exxon proposed to rework or recomplete the work or to drill another unit well.

Now, Article 18.2 of the operating agreement provides in part, "This agreement shall remain in force during the periods that the unit well is producing or capable of producing unitized substances from the unitized sand, but shall terminate as to the right of any party hereto to operate the unit area under the provisions hereof for the exploration, development or production of unitized substances from the unitized sand at the end of a period of ninety days during which the unit well is incapable of producing unitized substances from the unitized sand and during which a joint account or non-consent operation has not been commenced in an effort to restore unit production, provided, however, the applicable provisions of this agreement shall remain in force as long thereafter as necessary until all equipment in and on the unit area have been salvaged." So, according to Exxon, by May the 29th of 1984 it was ninety days after the well had stopped

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producing. The rights of the parties to operate the unit area under the operating agreement had expired. The Williams, Inc. lease, upon which the well was located, required that Exxon remove from the lease premises all the equipment and other property placed there by Exxon within a hundred and twenty days after the termination of the lease, and Williams requested Exxon to plug and abandon the well and remove the equipment. Exxon then prepared the AFE for $390,000 for the plugging and abandonment of the well required by Article 5.3 of the operating agreement, and, as I said before, on August the 22nd Exxon sent Levy the AFE, asking his approval. He responds by the September 10 letter saying that he had never received notice of abandonment, and he didn't consent to the abandonment. Exxon contends that it didn't abandon the well while it was producing oil, gas or other hydrocarbons from the unitized sand, and by letter dated September the 17th of 1984, three and a half months after the leases and the parties' rights under the operating agreement had expired, Mr. Levy notified Exxon that he was prepared to go forward and rework the well. Then on September the 19th of 1984 Exxon responded that because of those expirations, it couldn't assign any operating rights to Levy, and in the same letter Exxon made the meaningless offer of conveyance of the well and the well equipment. Then Mr. Levy formally declined that offer on September the 21st. Exxon contends that the notice to Levy was in strict compliance with Articles 10.1 and 18.2 of the operating agreement, and that Levy was not denied the opportunity to take over the well operation and, if he wanted to do so, it was up to him to give written notice to Exxon of his proposal, and that he didn't do it. Exxon also contends that Mr. Levy should have known of the May 29, 1984 expiration date, and that the March 16 letter clearly informed him that the well ceased to produce on February 29, 1984. He also knew that the letter did not propose any

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non-consent operation and didn't say that Exxon was going to perform any work whatsoever. So that Mr. Levy should have known, according to Exxon, that if he wanted to take over the well, he would have to give written notice to that effect within ninety days of February 29th, and that instead he did nothing. Exxon contends that Mr. Levy didn't have any right under Article 18.1 of the operating agreement, because Exxon didn't propose to abandon; that is, to stop producing the unitized sand while it was still producing. 18.1 is rather long, and you all are quite familiar with it, I know. In any event, it's Exxon's contention that Article 18.1 applies only during the time that the unit well is producing from the unitized sand, and Exxon says that that interpretation is clear from the reference to the non-abandoning party taking over the abandoning party's interest in the unit production, providing that the non-abandoning party, and the language of the article, shall be responsible for payments of royalties, overriding royalties and other payments out of the unit production, requiring the abandoning party to execute instruments as may be required by, again, and the language of the article, purchaser of production to show the transfer of ownership in the unit production, and by providing that rights of the abandoning party in unit production shall be transferred to non-abandoning party. That, I believe, fairly describes the position of Exxon. Exxon makes some other points that it's not necessary for me to reach at this juncture. Suffice it to say that the terms of the operating agreement are clear. So, therefore, in construing its meaning, I am required by Louisiana law, the Louisiana Civil Code, to construe the document within its four corners, and I do that with the further understanding of Louisiana's jurisprudence, that a person who signs a written agreement is presumed to know its contents.

Now, the plaintiff contends that in violation of the operating agreement he was denied pertinent information

regarding Exxon's intentions in its operation of Williams No. 1 Well. Since he admits that he did not request the information by the method of written communication, he can't rely on Section 7.2 of the agreement. Rather, he relies on certain language contained in Section 7.1 of the operating agreement, but that language can't be read in a vacuum. Section 7.1 provides for access to unit area. It says non-operator shall have access to the unit area at its own risk and expense at all reasonable times to inspect and observe operations hereunder, and access to all reasonable times to information pertaining to development or operation of the unit, including operator's books and records relating thereto. It seems clear, at least in the heading of this section, but also from the modifying language, that this section gave the plaintiff the right to visit Weeks Island Field and while there have access to the defendant's records relating to operation and development of the well in question, and even giving it a broader meaning, even to request if he visited other offices of Exxon, to get pertinent information that he might want. But this section doesn't give Mr. Levy the right to demand the information over the telephone. It's also clear from the testimony of Mr. Guiterez why a provision such as this would be added to the contract. The operator has to have some verifiable method of discovering who he is talking to or giving the information to. Of course, it's possible to acquire that information. Another vehicle Mr. Levy could have employed to gather pertinent information regarding the well was by writing pursuant to Section 7.2, but I think it's clear from the record that he didn't do that. Plaintiff has admitted that he received and that he read the March 15, 1984 letter. That letter gave clear notice of the cessation of production in compliance with Article 10.1 of the operating agreement. It also had the effect of notifying Mr. Levy that his rights under the agreement would expire ninety days from the date of cessation pursuant to Article

18.2. At that point Mr. Levy knew or should have known that he could propose a reworking or a recompletion of the well, but that he had to do that in writing pursuant to Article 10.1 of the operating agreement. Instead, for whatever reason, he chose not to do that.

I also find that contrary to plaintiff's contention, the March 16 letter did not misrepresent any facts. Exxon didn't promise to undertake remedial operations on the well. Rather, it represented that it was analyzing the well for remedial possibilities. The letter didn't limit that analysis to remedial possibilities for the "Y" sand. So Exxon reevaluated or evaluated, I should say, the recompletion of the "W" sand. Furthermore, there was testimony that the "Y" sand was in fact evaluated by studying its production history and by flowing the well to the pit for a period of nearly two weeks in March of 1984. Exxon's remedial efforts, though not required by the operating agreement, were taken in good faith.

Now, plaintiff has presented witnesses who have testified that sidetracking the well would have been feasible, though it's far from certain, considering the cost and the risk involved, and that it would have been successful. Nevertheless, it was incumbent on the plaintiff under Article 10.1 of the operating agreement to make such a proposal after he received notice of cessation, and he didn't do that.

Finally, I find that Article 18.1 of the operating agreement is not applicable. I find that because the well was not abandoned. In order for there to be an abandonment, the law requires an intention to abandon and an act of abandonment, and Exxon did not abandon the well, because it had no intention of stopping production while the well was producing hydrocarbons.

In summary, then, we have a case in which the plaintiff simply didn't comply with the terms of the operating

agreement, did not make the written request for additional information. He was given written notice of the cessation of operations from the Williams No. 1 Well. Exxon did not notify him that it proposed to rework or recomplete the well, and the plaintiff, despite being on notice, did not propose any remedial work on the well within ninety days of cessation of production as required by the operating agreement.

Accordingly, the defendant's motion for involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure is granted.

Now, I have, to the best of my ability, recited all of the facts and legal doctrine that I believe cover the facts of this case. The Court Reporter will prepare for any interested party a transcript of what I have said, but before you get it I will edit it. I read to you, I think, Article 18.1 and called it 18.2, and I will correct that kind of thing. Maybe it was just the opposite. In any event, I will edit it if anybody requests it, and it will then be available to you if you want it. I might say to both of you, all of you, though it may be of little consolation to the plaintiffs, that it was a case that I enjoyed, because it was something very new to me. Well, I knew very well what the case was about before I came here, and I think that's necessary. I'm not going to say before I came here, but before I took the bench Monday morning, and I think that that's a mark of good lawyering. I think I learned something. I suspect that plaintiffs may not agree with that, but I think I did, and I enjoyed working with all of you.

So there being nothing further in the matter, we will stand in recess.

(Whereupon, the proceedings were concluded.)

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-812

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATHAN A. LEVY, JR.,

Petitioner

versus

EXXON CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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November 27, 1987

A B Letter S

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QUESTION PRESENTED FOR REVIEW

Whether a Court of Appeals may, under Rule 52(a), F.R.C.P., draw a conclusion as to causation not drawn by the trial court when the facts are not in dispute and the conclusion is not at variance with any finding of the lower court?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NATHAN A. LEVY, JR.,

Petitioner

versus

EXXON CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Exxon Corporation ("Exxon"),[1] respectfully requests that this Court deny the petition for certiorari of Nathan A. Levy, Jr. ("Levy"), seeking review of the Fifth Circuit's decision in this case. The opinion of the Fifth Circuit is not reported, that court having deemed it to be of that class of opinions, described in Local Rule 47.5, that "have no precedential value and merely decide particular cases on the basis of well-settled principles of law." See App. 1a, footnote.

STATEMENT OF THE CASE

Because Exxon does not entirely agree with the

[1] Due to its considerable length, Respondent's Rule 28.1 List is contained in Appendix B to this brief. To differentiate between the Appendix to Respondent's Brief in Opposition and that annexed to the Petition for Certiorari, citations to Petitioner's Appendix will be made by referring to such Appendix as "App." followed by the page number at which located, *viz:* "App. p. 2a"; while citations to Respondent's Appendix will be made by referring to such Appendix as "R. App. p. 2r". Thus, the Rule 28.1 List (Appendix B hereto) is found at R. App. pp. 14r, *et seq.*

statement of the case in petitioner's petition, it substitutes therefore the statement of facts contained in the decision of the Court of Appeals (App. pp. 2a-3a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Levy makes a belated claim that the decision of the Court of Appeals herein is in conflict with decisions of this Court. Although Levy applied for a rehearing of the Court of Appeals' decision, he made no mention there of this now discovered alleged conflict.[2] Failure to raise the issue below is alone sufficient cause for denial of certiorari. *Cf. E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. ____, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19, 24 (1986) ("Our normal practice...is to refrain from addressing issues not raised in the Court of Appeals."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

2. The alleged conflict arises because the Court of Appeals chose to rest its decision on a ground assertedly different from that of the District Court; that is, that Levy's "wound" was self-inflicted, resulting in his having no right to recover from Exxon, whether or not Exxon had failed to give him an additional notice under the terms of the operating agreement. Specifically the Court of Appeals held:

> "It becomes clear that any failure by Exxon to give additional notice under Article 18.1 of intent or desire to abandon did not cause Levy to lose the opportunity to take over Exxon's interest and to rework the well to restore production. *It was Levy's own failure to act*, once he had been notified of the ceased production, that permitted

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[2] For the Court's convenience, there is attached hereto, as Appendix A, Levy's Application for Rehearing to the Court of Appeals.

> Exxon's leases to expire. Of course, lease expiration then foreclosed any reworking to restore production." (App. p. 6a.) (Emphasis added.) (Footnote omitted)

In making this determination, the Court said:

> "Our holding may be understood to rest on a determination of causation, which is normally a finding of fact. If so, we expressly conclude that a remand to the district court for factfinding on this issue is unnecessary.
>
> See *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976); see also *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1122 n.4 (5th Cir. 1987)." (App. p. 6a.)

Levy perceives this to be a violation of Rule 52(a), F.R.C.P., because he misunderstands the purpose of the 1985 amendment to Rule 52(a). As the Advisory Committee's Notes clearly disclose (Rule 52, F.R.C.P., 28 U.S.C.A. (Pocket Supp.), pp. 1-2), the purpose of the amendment was to discourage "appellate retrial of some factual issues" not to prohibit the Court of Appeals, in a proper case, from drawing a conclusion not made by the lower court from facts found by the lower court.

It is clear that a Court of Appeals may decide a case on a ground different from that on which a lower court based its decision so long as the issue was properly raised below.[3] *J. E. Riley Inv. Co. v. C.I.R.*, 311 U.S. 55, 59 (1940); *Bickford v. International Speedway Corp.*, 654 F.2d 1028, 1030 (5th Cir. 1981); *Southern Natural Gas Co. v. Pontchartrain Materials Inc.*, 711 F.2d 1251, 1257 (5th Cir. 1983), reh. den. 720 F.2d 1291. It is equally clear, as stated in 9

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[3] See App. 6a, footnote 2.

Wright & Miller, *Federal Practice and Procedure, p. 699,* §2577:

> "Although the appellate court, as has been seen, may remand for findings, it is settled that findings are not jurisdictional and the appellate court may decide the appeal without further findings if it feels that it is in a position to do so. The appellate court will determine the appeal without more if the record sufficiently informs it of the basis of decision of the material issues, or if the only contentions raised on appeal do not turn on findings of fact. A remand has been thought unnecessary if all the evidence is documentary or if the facts are undisputed.[4]

See, also, 5A *Moore's Federal Practice,* p. 52-158 ¶52.06[2].

Moreover, the District Court here had made the findings of fact necessary to support the conclusion drawn by the Court of Appeals; *viz:*

> "Plaintiff has admitted that he received and that he read the ...letter. That letter gave clear notice of the cessation of production in compliance with...the operating agreement. It also had the effect of notifying Mr. Levy that his

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[4] Levy's Reply Brief to the Fifth Circuit, served February 2, 1987, states (p. 1, under the heading: "Standard of Review"):

> "Plaintiff has no argument with the law as stated by the defendant. [Exxon had cited *Bessemer City (infra* p. 7) as authority for the standard of review to be used by the appellate court.] However, the District Court's decision is not based on findings of fact since *there is no contest about the facts.* The contest has to do with the interpretation of the meaning of phrases and words contained in a written Operating Agreement. The District Court's decision was based upon conclusions of law with respect to these facts...." (Emphasis added.)

rights...would expire ninety days from date of cessation.... At that point Mr. Levy knew or should have known that he could propose a reworking or a recompletion of the well, but that he had to do that in writing pursuant to Article 10.1 of the operating agreement. *Instead, for whatever reason, he chose not to do that.*"(App. pp. 18a-19a.) (Emphasis added)

The District Court went on:

"Now, plaintiff has presented witnesses who have testified that sidetracking the well would have been feasible, though it's far from certain, considering the cost and the risk involved, that it would have been successful. Nevertheless, it was incumbent on the plaintiff under Article 10.1 of the operating agreement to make such a proposal after he received notice of cessation, and he didn't do that." (App. p. 19a.)

The District Court concluded:

"In summary, then we have a case in which the plaintiff simply didn't comply with the terms of the operating agreement, did not make the written request for additional information. He was given written notice of the cessation of operations from the Williams No. 1 Well. Exxon did not notify him that it proposed to rework or recomplete the well, and the plaintiff, despite being on notice, did not propose any remedial work on the well within ninety days of cessation of production as required by the operating agreement.

Accordingly, the defendant's motion for involuntary dismisal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure is granted." (App. pp. 19a-20a.)

The Court of Appeals agreed with these findings, but drew from them a broader conclusion, utilizing also some

known circumstances discernible from the face of the record. The Court said:

> *It was Levy's own failure to act,* once he had been notified of the ceased production, that permitted Exxon's leases to expire. Of course, lease expiration then foreclosed any reworking to restore production." (App. p. 6a.) (Emphasis added.)

3. There is no conflict here with *Anderson v. Bessemer City,* 470 U.S. 564 (1985), nor with *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986). In *Bessemer City,* this Court (by way of dictum) severely criticized the practice existing in some circuits of paying no deference to findings of District Courts not based on determinations of credibility; however, its holding was that the Court of Appeals had improperly applied the "clearly erroneous" standard under the facts of that case. Even accepting the dictum as gospel, it does not apply here because the Court of Appeals made no finding at variance with any finding of the District Court.

Nor can there be any conflict in fact or in principle with *Icicle Seafoods,* There, the Court of Appeals, believing that the District Court had misunderstood the legal standards under which it was required to decide the case, embarked on a *de novo* fact finding, which went beyond the intention of Rule 52(a) or the teaching of *Bessemer City.* Here, the Court of Appeals made no *de novo* review nor extensive findings of fact. Indeed, all that the Court did here was to make a conclusory finding of causation, which could have been made by the lower court, based upon facts which the District Court had already found.

4. The petition (p. 11) claims that the Fifth Circuit is "developing a line of authority" in conflict with amended Rule 52(a) and *Bessemer City,* which argument is the only point made concerning the importance of the instant case

for exercise of this Court's discretionary writ. Yet it cites no other case *subsequent* to the adoption of the revised Rule or the rendition of *Bessemer City* in which the Fifth Circuit is supposed to have fallen from grace. Indeed, to the contrary, it seems that the Fifth Circuit has given a full measure of respect to both Rule and decision. See e.g., *Exchange Oil & Gas Corp. v. Great American Exploration Corp.*, 789 F.2d 1161, 1163 (5th Cir. 1986); *Vaughner v. Pulito*, 805 F.2d 873, 879 (5th Cir. 1986); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 603 (5th Cir. 1986); *Brock v. Mr. W Fireworks, Inc.* 814 F.2d 1042, 1044 (5th Cir. 1987), cert. den. ____U.S.____, 108 S.Ct. 286; and *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 372 (5th Cir. 1987).

5. Levy complains of the method used by the Court of Appeals to reach the result herein, but nowhere does he show that the end *result* was "wrong." He asks this Court to order the Court of Appeals to remand the case to the District Court so that that court could perform the ministerial task of making a conclusion of causation, which is logically inescapable from the findings already made--a practice hardly in keeping with the concern of *Bessemer City* as to judicial economy. (See 470 U.S. at pp. 574-575.)

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Counsel for Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * *

CIVIL ACTION NO. 86-3503

* * * *

NATHAN A. LEVY, JR.
Plaintiff-Appellant

versus

EXXON CORPORATION
Defendant-Appellee

* * * * * *

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

* * * * * *

HONORABLE MORY L. SEAR
DISTRICT COURT JUDGE

* * * * * *

APPLICATION FOR REHEARING

* * * * * *

Petitioner, Nathan A. Levy, Jr., respectfully requests rehearing of this matter.

ISSUE

Levy excepts to the Court's ruling that his failure to propose reworking operations caused the Exxon leases to expire.

ARGUMENT

EXXON WAS OBLIGATED TO PROVIDE LEVY FIFTEEN (15) DAYS NOTICE BEFORE EXXON'S LEASES EXPIRED

Article 19 of the Operating Agreement addresses release of leases:

> 19.1 RELEASE. The leases set forth in Exhibit A shall not be released in whole or in part as to lands within the Unit Area without mutual consent of the parties hereto. If any party at any time desires to so release, it shall give notice to the other party hereto. The party notified shall have the option, for fifteen (15) days thereafter, to receive upon demand an assignment (unless an assignment is prohibited by such lease), without warranty of title, express or implied, of the Operating Rights in such lease (insofar as it affects lands within the Unit Area and applies

> to the Unitized Sand) as to which such notice is given. In the event the party notified does not elect to receive such assignment, the lease as to which such notice is given may be released. ...

This Court's opinion makes no mention of Article 19 whatsoever.

The decision states, in part: "[U]nder Article 10.1, it was incumbent upon Levy . . . to propose and commence a reworking within ninety days of cessation of production in order to prevent the expiration of Exxon's leases." (p. 7, para. 2). The Court's determination of causation ignores each party's duty to protect its leases for the benefit of the other party under Article 19.1. Levy was not required to propose reworking operations under Article 10 to notify Exxon that Levy wished to invoke his rights under Articles 18.1 (abandonment). Article 19 puts the burden of notice on the party who owns the leases affected - Exxon's leases expired, not Levy's.

Levy was entitled to rework the well under the provisions of

Article 18.1 without first proposing reworking operations under Article 10. Article 19 is the cornerstone to Levy's Article 18.1 (abandonment) rights in the well, not Article 10.1 (reworking) as the Court has held. Article 19 requires notice followed by a fifteen (15) day option to demand assignment of the leases before they expire to insure that the right to take over the well under Article 18.1 can be exercised. Article 19 becomes operative precisely when reworking operations are not commenced under Article 10.1 so that reworking can be commenced under Article 18.1 before the leases expire.

LEVY HAD NO DUTY TO PROPOSE REWORKING OPERATIONS UNDER ARTICLE 10.1 TO INVOKE HIS RIGHTS UNDER ARTICLES 18.1 AND 19.1

The court holds that Levy's rights under Article 18.1 never became operative under the facts of the case because Levy's failure to propose reworking operations under Article 10.1 caused Exxon's leases to expire. This completely overlooks Article 18.2,

which provides that the only time a party is required to commence reworking operations under Article 10.1 or forfeit his Article 18.1 rights in the well is when the well site owner (Exxon) proposes to plug back or deepen the well in an effort to recomplete in a non-unitized sand.

> [P]rovided, however, any party hereto which owns an interest in the land on which the Unit Well is located (hereinafter referred to as well site owner, whether one or more) may notify all other parties hereto in writing that it desires to plug back or deepen such well in an effort to recomplete it in a sand other than the Unitized Sand and the date by which operations must be commenced to maintain its Operating Rights in such land. All otner parties hereto shall thereupon be deemed to be willing to relinquish control of such well to well site owner unless operations are subsequently proposed on such well as to the Unitized Sand by one or more of such parties under the provisions of Article 10 (regarding non-consent operations), and, in such event, the notice of such proposal must be given, the replies thereto must be received and such operations

> must actually be commenced by the dates specified in such Article 10... . (Article 18.2)

Although Exxon considered recompleting uphole in the non-unitized "W" sand, it never elected to exercise this right. Levy therefore had no duty to propose reworking under Article 10.

> "On March 28, 1984, the Reservoir Engineer made the following notation on a Problem Well Report: 'There is one marginal recomplete uphole. The geologist is currently re-evaluating his maps. Depending on what the geologist comes up with, will either try a recomplete or give up the acreage that the Williams No. 1 is holding.' The Problem Well Report was approved by Exxon's District Reservoir Engineer." (PTO - Uncontested Facts #21)

Exxon's March 16, 1984 letter to Levy stated that production had ceased and that the well was being analyzed for remedial possibilities. Levy could not rely on Exxon coming forward with a reworking proposal after concluding its analysis. Levy negotiated a proposal from Steven S. McGuire of Traillour Oil Company to

rework, and assume the obligation of plugging and abandoning the well in exchange for a participating interest in the event Levy obtained the rights to the well and necessary leases from Exxon (Tr. 196-202), limited testimony; Offer of Proof, excluded testimony). Levy could exercise his rights under Articles 18.1 and 19.1 should Exxon decide not to rework the unitized sand and not to recomplete in the non-unitized "W" sand. Levy had no duty to propose non-consent operations under Article 10.1 unless and until Exxon invoked Article 18.2 by electing to recomplete the well in the non-unitized sand, while under Article 19, Levy had no right to demand assignment of the leases until he received the fifteen (15) day notice from Exxon of its intent to release. The Operating Agreement does not impose on Levy the burden of reminding Exxon not to forget to give him this notice.

Article 10.1 contains a provision limiting liability for loss of

lease interest resulting from delay in conducting reworking operations:

> If operations are necessary at an early date to maintain any interest covered hereby, the owner shall notify Operator. Bona fide efforts shall be made to maintain such interest but no party hereto shall incur any liability to any other party hereto if such interest is lost by failure to conduct operations in time to prevent such loss. ...

Notice is required under this provision. Only loss resulting from delay in conducting operations relieves a party from liability, not loss resulting from failure to give notice that the leases are in jeopardy. Furthermore, the provision is not applicable because Levy's claim is for breach of Article 19, not for failure to timely commence reworking operations under Article 10.

Two matters should be brought to the Court's attention. First, Article 19 provides that the notified party has the option to demand assignment "unless an assignment is

prohibited by such lease." The Williams lease does not prohibit assignment. (Ex. D-35 and D-35a)[1] The record contains no evidence that Exxon ever attempted to obtain Williams' consent to assign the leases to Levy. Under the Williams lease Exxon would remain the principal obligor unless Williams consented to the assignment.

Secondly, Article 19 employs the term "release" to mean termination of a party's rights in the lease. Passively allowing the leases to expire constitutes a release under

---

1 Article 10 of the Williams Lease (Ex. D-35) provides assignment of the lease will not be made without lessor's prior consent. Ex. D-35a is a letter agreement between Exxon and Williams, Inc. amending the first sentence of Article 10 by adding "which shall not be unreasonably withheld."

Article 19.[2] Louisiana Law (LSAR.S. 31:206) requires a lessee to file an acknowledgment of release with the registry of the parish in which the land is located. It is manifest that Article 19.1 is designed to give the parties the opportunity to take over and further develop the lease in question. Exxon breached Article 19 no less than fifteen (15) days before the lease expired and not by instrument filed by Exxon into the public records on Jyne 25, 1984. "Release" under Article 19 means termination of legal rights in the lease not the evidencing document.

> "A provision susceptible of different meaning must be interpreted with a meaning that renders it effective and not one that renders it ineffective." (LSA-C.C. Art. 2049)

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2 See: Jones v. Whittington 171 So.2d 764, 768 (La. App. 1965), writ denied, 172 So.2d 703, for a concise discussion on "passive breach" of contract i.e. obligor cannot defeat the rights of obligee by failing to act before the leases expire.

As to Exxon's intent to release the acreage, the problem well report of March 28, 1984 states:

> Depending on what the geologist comes up with, will either try a recomplete or give up the acreage that the Williams No. 1 is holding. (PTO - Uncontested Fact #21, supra, p. 4)

Once Exxon decided not to recomplete the well, it sat passively by while the leases expired:

> Additionally, Exxon's reservoir engineering department was formulating a proposal to recomplete the Williams No. 1 Well in another sand, the "W" Sand. The proposal was disapproved on or about May 18, 1984. (PTO - Defendant's Statement of Material Fact, p. 11)

Exxon knew the leases were due to expire on May 30, 1984:

> The Williams #1 well was shut-in on February 29, 1984, due to declining gas production. All leases within the Unit Y RD SUA (701±ac.) are subject to a 90-day savings clause as described in my letters of August 10 and October 4, 1983. The critical date is May 30, 1984. The Harvey District has been unable to promote a farmout of the

> acreage, and plans no further action to maintain these leases. ... (PTO - Ex. P-16, Internal Correspondence dated March 22, 1984)

CONCLUSION

This not a case of the chicken and the egg. Levy was not required to propose reworking under Article 10 to invoke his rights under Articles 18 and 19. The rights under Articles 18 and 19 provide an independent economic alternative to feasibly and fully develop the valuable interests in question, just as Articles 10 and 18.2 provide other economic alternatives. One right was more valuable than another based on the relative positions of the parties. Exxon defeated the rights valuable to Levy by failing to notify him before Exxon's leases expired.

For the above reasons, petitioner Levy respectfully requests that his Application for Rehearing be granted, that oral argument in this matter be granted, and that this Court

reverse its decision and the decision of the District Court.

Respectfully submitted,

CARMOUCHE, GRAY & HOFFMAN
A Professional Law
Corporation

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LAKE CHARLES, LA 70602
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COUNSEL FOR NATHAN A. LEVY, JR.
PLAINTIFF - APPELLANT

APPENDIX B

RULE 28.1 LIST

EXXON CORPORATION
Affiliates and Subsidiaries
Not Wholly-Owned*

Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B.V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.

*Does not include companies with less than 5% Exxon Ownership.

BEB Erdgas und Erdol GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdol GmbH,
Hannover
Bryan Woodbine Gathering Inc.
Building Products of Canada Limited
Byron Creek Collieries (1983) Limited
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlin Oil Products Limited
Changi Airport Fuel Hydrant
Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en
Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condes
S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxien des Combustibles
(C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Flussigerdgas Terminal
GmbH
Daihatsyu Sekiyu K.I.
Daiichi Kouyu K.K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.

Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdol GmbH, Hannover
Elwerath Erdol und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F.T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.

Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K. K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane - Lavera
Gewerkschaft Brassert Erdol und Erdgas GmbH
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdol GmbH
Gewerkschaft Kuchenberg Erdgas under Erdol GmbH
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Groupement pour l'Etude d'un Pipeline Bordeaux Toulouse
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.

Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Company Ltd.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industry Promotion Enterprises Limited
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoel Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited

Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung
Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki
Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refinieries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company
Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur
luzernisches Erdol
Leco Canada Inc.
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Olia Terminal N.V.
Maasvlakte Coal Terminal B.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.

Minerals Limited
Mittelrheinische Erdgas Transport
Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les
Pipe-Lines Montreal Limitee
Mytex Polymers Incorporated
NAM - K 7 B.V.
NAM - K 14 B.V.
NAM - K 15 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
N. V. Nederlandse Gasunie
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company
Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs
G.m.b.H.
Norddeutsche Mineraloelwerke Stettin
G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft
m.b.H.
Nordrheinische Erdgas Transport
Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.

139675 Canada Limited
151742 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabi) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pinpoint Retail Systems Inc.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Folder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S.A.
Renown Building Materials Limited

Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
SEAG Aktiengelellschaft fur schweizerisches Erdol
S.O.P. - Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.

Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" - PROLUMA S.A.
Societe Belge de Transport par Pipe-line
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
SocieteCivile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S.A.
Societe de Promotion et du Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Development d'Operations Commerciales

Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la
Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et
d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de
Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations
Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company
(Petroleum Maatschappij)
Southern Natural Gas Development Pty.
Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gas de Lavera
Suddeutsche Erdgas Transport
Gesellschaft mit beschrankter Haftung
Sun East Company Ltd.
Supertex, Inc.
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Industries Limited
System Plaza Kabushiki Kaisha
305120 Alberta Ltd.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft
Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.

Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A
Tanklager Taegerschen AG
Tecnica Quimica Petrolera. S.A. de C.V.
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Arabian Pipe Line Company
Transalpine Oelleitung in Oesterreich
  Gesselschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG - Unterflurbetankungsanlage
  Flughafen Zurich
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.

Westdeutsche Erdolleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-
  Rodewald G.m.b.H.
Worex et Cie
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugan Kaisha Nishi Kobe Bosai Center